

**U.S. Department of Labor**

Office of Administrative Law Judges  
John W. McCormack Post Office and Courthouse  
Room 505  
Boston, MA 02109

(617) 223-9355  
(617) 223-4254 (FAX)



**Issue date: 14May2001**

CASE NO.: 2000-LHC-1834

OWCP NO.: 1-147471

IN THE MATTER OF:

**ROBERT M. RANCOURT**  
Claimant

v.

**BATH IRON WORKS CORPORATION**  
Employer/Self-Insurer

**APPEARANCES:**

Marcia J. Cleveland, Esq.  
For the Claimant

Evan M. Hansen, Esq.  
For the Employer/Self Insurer

**BEFORE: DAVID W. DI NARDI**  
Administrative Law Judge

**DECISION AND ORDER - AWARDING BENEFITS**

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 30, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for a Carrier's and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

**Post-hearing evidence has been admitted as:**

<b>Exhibit No. Date</b>	<b>Item</b>	<b>Filing</b>
CX 21	Attorney Cleveland's motion that the record be closed as the Employer has not complied with this Court's post-hearing schedule for the filing of additional evidence	03/19/01
ALJ EX 12 04/17/01	This Court's <b>ORDER</b> closing the record as no response was filed by the Employer	
EX 28 04/18/01	Attorney Hansen's letter requesting the record be reopened	
CX 22	Attorney Cleveland's letter objecting to the record being reopened	04/27/01
ALJ EX 13 05/02/01	This Court's <b>ORDER</b> denying the motion to reopen the record	

The record was closed on May 2, 2001 as no further documents were filed.

**EVIDENTIARY ISSUE**

The formal hearing was held herein on November 30, 2000 and the Employer was given sixty (60) days to file "copies of older surveillance videos," the deposition testimony of the videographer and/or private investigator, the deposition of Kenneth Black as well as "copies of the transcripts of hearings before the state workers' compensation board." (TR 83-86)

However, none of that evidence has been offered by the Employer and by letter dated March 15, 2001 Claimant moved that the record be closed and the objected-to-evidence be excluded from the record as the Employer has failed to abide by the post-hearing schedule by the Court. As the Employer filed no response to the motion, the record was closed by **ORDER** issued on April 17, 2001 (ALJ EX 12) as Claimant has been denied the opportunity to cross-examine and confront that evidence

identified by the Employer.

Employer's counsel thereupon moved that the record be reopened (EX 28) and Claimant's counsel, citing several reasons, vigorously opposed the motion. (CX 22) This Court agreed with the reasons cited by Claimant and the Employer's motion was denied by **ORDER** issued on May 2, 2001. (ALJ EX 13) In this regard, **see Williams v. Marine Terminals Corp.**, 14 BRBS 728 (1981).

As EX 26 and EX 27 were provisionally admitted into evidence subject to giving Claimant the opportunity to depose Ms. D'Ambrosio and as that deposition did not take place, EX 26 and EX 27 are not admitted into evidence and will play no part in the decision hereto.

### **Stipulations and Issues**

#### **The parties stipulate, and I find:**

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant time.
3. Claimant alleges that he suffered an injury on April 15, 1999 in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury in a timely manner.
5. Claimant filed a timely claim for compensation on and the Employer filed a timely notice of controversion.
6. The claim for compensation is dated July 20, 1999 and the Employer's notice of controversion is dated October 1, 1999.
7. The parties attended an informal conference on February 17, 2000.
8. The applicable average weekly wage is \$538.87.
9. The Employer has paid no compensation but some medical bills have been paid.

#### **The unresolved issues in this proceeding are:**

1. The fact of injury.

2. Whether Claimant's current condition is causally related to his maritime employment.

3. If so, the nature and extent of such disability.

4. Entitlement to an award of medical benefits and interest on unpaid compensation benefits.

5. Entitlement to an attorney's fee.

### **Summary of the Evidence**

Robert M. Rancourt ("Claimant" herein), fifty (50) years of age, with a high school education and one year of technical college, and an employment history of manual labor, began working on March 22, 1979 (CX 5) as an outside machinist at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. As an outside machinist he performed most of his assigned duties on board the vessels, often in awkward positions and in tight and confined spaces. On April 15, 1999 Claimant was working on Hull 467 at the shipyard on the building ways when while "going through (the) uptakes (he) hit (his) head on (a) foundation," and he immediately experienced the onset of pain and spasm in his neck. He immediately reported the injury to on-duty personnel at the Employer's First Aid. The Employer authorized medical care and treatment and Claimant continued to work at his regular job for two weeks or so and, as the cervical symptoms persisted, he was put on light duty. (TR 28-31; CX 5)

Claimant was assigned duties of basically stripping wires, sorting nuts and bolts in his department and he continued to have physical therapy at First Aid and chiropractic treatment from the Employer's chiropractor. Claimant was then referred by the chiropractor to Dr. Thomas C. Doolittle, a neurosurgeon. Claimant later chose to be treated by Dr. Eric P. Omsberg, a specialist in neurological surgery, as his free choice of physician. He saw the doctor on July 22, 1999 (CX 7) and Dr. Omsberg then referred Claimant to Dr. Alan D. Ross, a physiatrist specializing in physical medicine and rehabilitation, and the doctor, who first saw Claimant on August 25, 1999, now is Claimant's treating physician. (CX 8) Claimant continued working until September 22, 1999, at which time he stopped working because he was unable to drive to work or do his assigned jobs because of the medications he was taking for his cervical pain. (TR 31-33, 53-57)

According to Claimant, Dr. Ross took him out of work and Claimant called in weekly to his department at the shipyard looking for work within his restrictions but he has been unable to find such adjusted work at the shipyard; he even asked his union to provide assistance on this issue but this did not provide any results. Dr. Ross telephoned the Employer with Claimant's restrictions but Claimant was told by the Employer's representative, a Mr. Black, that Claimant's restriction permitted him to work on the ships on the building ways but Mr. Black did not offer Claimant any specific job on the boats. Claimant has talked to Mr. Black several times but there have been no job offers. Claimant has even enrolled in a job training program through the auspices of the State of Maine but that agency could not offer suitable work within his restrictions. He was unable to work until June 12, 2000, at which time he found work through his own efforts as a janitor for Four Seasons Janitorial Contractor. He is able to perform this work as it is much easier work and as he is able to pace himself. He works an average of 30-40 hours each week. He began at \$7.00 per hour and now earns \$8.50 per hour. (TR 31-38, 57-80)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

#### **Findings of Fact and Conclusions of Law**

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute

sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, *i.e.*, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra; Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra; Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could

have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. *See, e.g.*, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. *See* **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See, e.g.*, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. *See* **Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. *See, e.g.*, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. *See generally* **Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony that negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5<sup>th</sup> Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee



bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The persuasive testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT) (9<sup>th</sup> Cir. 1999).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. That Court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56, 31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial

evidence to the contrary." 33 U.S.C. §920(a). See **Shorette**, 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); see also **O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); but see **Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his cervical pain syndrome, resulted from working conditions and/or the April 15, 1999 accident at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

## **Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant was injured in the course of his maritime employment on April 15, 1999, that the Employer had timely notice of such injury and authorized appropriate medical care and treatment (CX 1) and that Claimant timely filed for benefits once a dispute arose between the parties. (CX 2) In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve. (CX 7)



## **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as an outside machinist. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and

persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even

though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. See **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), cert. denied. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott**, 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the

claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.**, 9 BRBS 138 (1978), **aff'd mem.**, 617 F.2d 292 (5<sup>th</sup> Cir. 1982).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total and/or partial disability from September 22, 1999 to date and continuing. Moreover, the issue of permanency has not yet been considered by the Deputy Commissioner. (ALJ EX 2) **In this regard, see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Turner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook, supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).



It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury. Richardson, supra; Cook, supra.**

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White, supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back condition and that his Employer has allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see, e.g., Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Turner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White, supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the

employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As noted above, Claimant was initially treated at the Employer's First Aid by Wayne McFarland, N.P., between April 15, 1999 and May 29, 1999, at which time Mr. McFarland referred Claimant to Dr. Thomas C. Doolittle, a neurosurgeon, for further evaluation. (EX 11 at 238, EX 12 at 243-253, EX 13 at 254-260)

Dr. Doolittle examined Claimant on June 9, 1999 for evaluation of "neck and bilateral hand symptoms" and the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and medical records and the physical examination, opined that Claimant's neck symptoms are causally related to his April 15, 1999 shipyard injury, that conservative treatment should continue, that Claimant was able to work in the Employer's "alternate work program" and that his residual work capacity cannot be fully addressed until his cervical and bilateral hand symptoms had been resolved. (CX 11)

Claimant's family doctor referred him for further evaluation by Dr. Eric P. Omsberg, a specialist in neurological surgery, and the doctor, who saw Claimant on July 22, 1999, diagnosed Claimant's problems as due to "an ongoing irritable focus with myofascial and cervical strain, (as well as) probably overuse syndrome in the wrist," and he also recommended continued conservative treatment. (CX 7)

One month later Claimant went to see Dr. Alan D. Ross, a specialist in pain management, and the doctor, after the usual social and employment history, his review of Claimant's medical records and diagnostic tests and the physical examination, reported that Claimant's MRI showed a mild mid-line bulge at the C5-6 level, prescribed "therapy with manual medicine," referred him to Meredith Coffin, OTR, and associates in Waterville, and he opined that Claimant had "sustained a strain to the cervical disc, that Claimant should continue with his light duty and that a functional capacities evaluation (FCE) would be performed at a later point in time to determine his residual work capacity as he approaches maximum medical improvement. (CX 8)

As the symptoms continued Dr. Ross took Claimant out of work, effective September 22, 1999, to see if the rest would alleviate the symptoms. (CX 8) As of October 7, 1999, Dr. Ross

recommended that Claimant undergo an FCE and as that valid test on October 14, 1999 produced work restrictions that "were disappointingly severe," Dr. Ross opined that Claimant should not return to work at the shipyard as an outside machinist, that "he has the capacity to perform some kind of light duty work full time" and that he should "contact the Maine Vocational Rehabilitation regarding job retraining." (CX 8)

The symptoms continued and Dr. Ross referred Claimant to Michael Totta, M.D., for further evaluation and a possible discogram. (CX 8) That examination took place on January 10, 2000 and Dr. Totta, an orthopedic specialist, diagnosed the symptoms as due to "cervical segmental pain syndrome, questionably discopathic" at the C5-6 level and the doctor recommended surgery only as a last resort and after all other avenues have been exhausted. (CX 14)

Claimant was then seen by Jonathan M. Borkum, Ph.D., a licensed psychologist, "for behavioral medicine services" and Dr. Borkum, in his April 24, 2000 letter to Dr. Ross, outlined an appropriate treatment regimen for Claimant, including job retraining, biofeedback therapy and gradual weaning from all of the medication that he was taking for his various medical problems. (CX 15)

Dr. Peter K. Esponnette, in his October 6, 1999 letter to the Employer's workers' compensation adjuster, opined that Claimant's cervical problems are related to his April 15, 1999 shipyard accident. (CX 13)

Dr. Ross continued to see Claimant as needed and kept him out of work as the Employer was unable to provide work within his physical limitations. As of December 20, 1999, Dr. Ross opined that Claimant could not work in the strut shop because "this would involve using vibrating tools and heavy lifting which (the doctor did) not believe he would tolerate." (CX 8) As of March 30, 2000 Dr. Ross opined that Claimant "reasonably decided not to proceed" with the recommended surgery and, as of April 20, 2000, Dr. Ross imposed these work limitations (CX 8):

1. He may work full-time.
2. Lift 15 pounds frequently, 30 pounds occasionally.
3. He requires a work station that allows him to change from sitting to standing at will.
4. A 5 minute stretch break every hour.
5. Occasional bending or working overhead.

6. No vibrating tools or temperature extremes.

The last letter from Dr. Ross in this closed record is dated November 24, 2000 (CX 8), the last letter from Dr. Omsberg is dated March 9, 2000 (CX 7), the last letter from Dr. Totta is dated March 28, 2000 (EX 24), the last report of Dr. Borkum is dated September 6, 2000 (CX 15) and the physicians timely sent their attending physician's reports to the Employer. (CX 18)

The Employer, alleging that Claimant is only partially disabled, has filed the January 12, 2000 Transferrable Skills Analysis and Labor Market Survey of Arthur M. Stevens, Jr., the Employer's Vocational Consultant, wherein Mr. Stevens opines that Claimant has the residual work capacity to work full-time as a hotel/motel desk clerk, as a rental truck sales person, as a counter sales person for auto parts, as a customer service representative in a video store, as a counter at a bowling alley, as a department store greeter and at numerous other jobs and prospective employers as identified on page 4 of his report. (EX 8) Mr. Stevens has indicated that these jobs vary from minimum wage entry level wages to as much as \$50,000.00 in commission auto sales.

Initially, I note that the Employer has also offered the surveillance videotape prepared by La Pointe Investigators and dated 10/5/99-10/6/99-10/7/99, as well as the October 14, 1999 report of David Froisland, licensed Private Investigator.<sup>1</sup>

As indicated above, the Employer has offered a Labor Market Survey (EX 8 and EX 8A) in an attempt to show the availability of work for Claimant as a hotel/motel clerk and a rental truck clerk and counter sales clerk and the numerous other jobs identified by Mr. Stevens. I accept the results of that survey which consisted of the counselor making a number of telephone calls to prospective employers. Mr. Stevens also visited a number of prospective employers to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job

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<sup>1</sup>As Claimant has been denied the opportunity to depose the videographer and the private investigator, that proposed evidence is rejected and will play no part herein as Claimant has been denied his due process rights in confronting the videographer and the private investigator at their deposition.

opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 8 and EX 8A) can be relied upon by this Administrative Law Judge for the more basic reason that there is complete information about the specific nature of the duties of those jobs identified by Mr. Stevens.

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the parties are in disagreement as to Claimant's post-injury wage-earning capacity. Thus, in my judgment, **Air America, supra**, and **Argonaut Insurance Co., supra**, are distinguishable as involving claims for total disability benefits.

In view of the foregoing, I do accept the results of the Labor Market Survey because I find and conclude that those jobs constitute, as a matter of fact or law, **suitable** alternate

employment or **realistic** job opportunities for the Claimant. In this regard, see **Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

As noted above, once claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner, supra**; **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT) (5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beulah v. Avis Rent-A-Car**, 19 BRBS 131, 133 (1986). Moreover, employer is not actually required to place claimant in alternate employment, and the fact that employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not **bona fide**. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

In view of the foregoing, I find and conclude that Claimant's post-injury are not representative of his wage-earning capacity from June 12, 2000 to date and continuing because all of the doctor who have examined Claimant have opined that he can work full-time and because his hours as a janitor have ranged from a low of 19 hours to as many as 35.75. (CX 20) Clearly Claimant is not working at his full potential.

Accordingly, I find and conclude that the Employer's labor market survey, one that is most detailed, specific and informative, conclusively establishes that Claimant can return to work full-time, if properly motivated, and perform those

light duty jobs identified by Mr. Stevens and at those prospective employers identified by Mr. Stevens.

As also noted above, Claimant did not return to work until June 12, 2000 but, as the Employer has shown the availability of suitable alternate work s of January 12, 2000, Claimant's partial disability benefits shall begin as of that day. I further find and conclude that Claimant has a post-injury wage-earning capacity of \$5.50, the post-injury adjusted hourly rates for the entry-level jobs identified by Mr. Stevens, and as he can work forty hours each week, thereby resulting in a wage-earning capacity of \$220.00, or a loss of wage-earning capacity of \$318.87.

### **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

### **Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (CX 1 - CX 3) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).



An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about July 20, 1999 (CX 2) and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim. Moreover, it is apparent that Claimant's recovery herein has been delayed by the Employer's failure to provide appropriate medical care and treatment to the Claimant.

Accordingly, the Employer is responsible for the reasonable, necessary and appropriate medical care and treatment in the diagnosis, evaluation and treatment of Claimant's cervical pain syndrome, commencing on July 20, 1999, subject to the provisions of Section 7 of the Act.

#### **Attorney's Fee**

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a

self-insurer. Claimant's attorney shall file a fee application concerning those services rendered and costs incurred after February 17, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

#### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from September 22, 1999 through January 11, 2000, based upon an average weekly wage of \$538.87, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer shall also pay to Claimant compensation for his temporary partial disability, based upon the difference between his average weekly wage at the time of the injury, \$538.87, and his wage-earning capacity after the injury, \$220.00, as provided by Sections 8(e) and 8(h) of the Act.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on July 20, 1999, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those

services rendered and costs incurred after the informal conference on February 17, 2000.

A

**DAVID W. DI NARDI**

Administrative Law Judge

Boston, Massachusetts

DWD:jl